June 22, 2001

Mary L. Cottrell, Secretary
Massachusetts Department of Telecommunications and Energy
One South Station, 2nd Floor
Boston, MA 02114

Re: Investigation by the Department of Telecommunications and Energy commencing a rulemaking pursuant to 220 C.M. R. § 2.00 et seq., revising the billing procedures for calculating a residential rental property owner's responsibility in non-minimal use sanitary code violations as set forth in 220 C.M. R. §§ 29.00 et seq., D.T.E. 01-21

Dear Ms. Cottrell:

On May 25, 2001, the Department of Telecommunications and Energy ("Department") issued an Order ("Rulemaking Order") instituting a rulemaking proceeding, pursuant to G.L. c. 30A § 2 and G.L. c. 164 § 76C, to revise the billing procedures for calculating a residential rental property owner's ("Owner") responsibility in non-minimal use sanitary code violations, as set forth in 220 C.M.R. §§ 29.00 *et seq*.[1] The Department invited comments on the proposed regulations. The Attorney General submits this letter as his Initial Comments on the Department's proposed changes to the existing regulations.[2]

After review of the proposed regulations, the Attorney General requests that they be modified to:

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[1] Section 29 of the Department's regulations establishes billing procedures that permit electric and gas companies to re-bill an Owner for utility service charges improperly billed to a tenant customer as a result of electric or gas meter State Sanitary Code violations.

[2] The Attorney General's comments do not address all issues raised by the Rulemaking Order. Accordingly, the lack of comment on other matters contained in the Rulemaking Order should not be construed or otherwise interpreted as the Attorney General's agreement, assent, or acquiescence to those matters.

- establish an objective standard or set of criteria for determining the cost of operating an appliance, apparatus or service wrongfully connected to a tenant customer's ("Tenant") meter in violation of the State Sanitary Code (the "Code");[3]

- retain within the Department the exclusive decision-making authority and discretion in apportioning the utility bill or utility service charges between the Owner and the Tenant, or in the alternative, narrowly tailor the decision-making authority being delegated to the utility companies; and

- include a deterrence provision in the proposed regulations that would discourage an Owner from taking the risk to commit Code violations where the benefit of such conduct may outweigh the cost to such Owner.

1. The Department's Current Regulations, 220 C.M.R. § 29, Establish Billing Procedures That Allow an Electric or Gas Company to Re-bill an Owner for Utility Service Charges Improperly Billed to a Tenant as a Result of an Owner's Electric or Gas Meter Code Violations.

The Department adopted Section 29 which is entitled "Billing Procedures for Residential Rental Property Owners Cited for Violation of the State Sanitary Code 105 C.M.R. 410.354 or 105 C.M.R. 410.254" in its final order in Sanitary Code Rulemaking, D.P.U. 90-280 (1994). The scope of Section 29 is limited to circumstances involving violations of Code sections 410.354[4] and 410.254.[5] Section 29 establishes procedures that permit electric and gas companies to re-bill an Owner for utility service charges improperly billed to a Tenant as a result of the Owner's electric or gas meter Code violations. Section 29 distinguishes between an Owner's minimal use and non-minimal use electric and/or gas meter violations. As to minimal use violations, Section 29 provides that a violation is minimal where the violation individually or in the aggregate includes interior and/or exterior common area

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[3] The Department of Public Health's State Sanitary Code regulations, 105 C.M.R. §§ 410.000 *et seq.*, establish the "Minimum Standards of Fitness for Human Habitation" which are applicable to every owner-occupied or rental dwelling in Massachusetts.

[4] Code section 410.354 provides in relevant part that an Owner is required to provide and pay for electric or gas service to a Tenant's dwelling unit unless: (1) a written lease agreement provides that the Tenant shall pay, and (2) the Tenant's dwelling unit is wired through a meter that registers only the energy consumption of that dwelling unit except as permitted by Code section 410.254.

[5] Code section 410.254 provides in relevant part that in a dwelling containing three or fewer dwelling units, the light fixtures used to illuminate a common hallway, passageway, or stairway may be wired to the electric service serving an adjacent dwelling unit provided that where the Tenant is required to pay for the electric service to the dwelling unit, then a written agreement shall state that the Tenant is also responsible for paying for the common area lighting.

illumination (excluding exterior flood lights), smoke, fire or security alarms, door bells, cooking range, and common area electrical outlets. 220 C.M.R. § 29.08. As to non-minimal use violations, Section 29 provides that a violation shall not be deemed to be minimal (thus, non-minimal) where the Code violation citation includes or otherwise cites the wrongful connection of heating, air conditioning, hot water heating, electrical pump(s), clothes dryer, refrigerator or freezer onto the meter serving the Tenant's dwelling unit. 220 C.M.R. § 29.08.

Additionally, Section 29 provides that with respect to both minimal use and non-minimal use violations, the utility company shall determine or otherwise calculate the liability of the Owner for the utility service charges improperly billed to the Tenant and thereafter re-bill the Owner for the same subject to certain restrictions and/or limitations. One restriction or limitation is that an electric or gas company is allowed to re-bill the Owner retroactively for only the lesser of the following time periods: (1) by calculating back two years from the effective date of the Code violation citation; (2) by referencing back to the date that the Tenant became a customer of record for service to the dwelling unit; and (3) by reviewing the billing history for the dwelling unit that is the subject of the violation over a two year period back from the effective date of the citation to determine the approximate date of the commencement of the Code violation(s). 220 C.M.R. § 29.07. Another restriction or limitation is that in circumstances involving minimal use violations, an electric or gas company is allowed to retroactively re-bill the Owner only in the amount of $10.00 per month thereby further limiting an Owner's liability on such minimal use circumstances whereas in circumstances involving non-minimal use violations, the Owner is held liable retroactively for the Tenant's entire utility service bill.

Finally, for both minimal and non-minimal use violations, Section 29 provides that following a Code violation citation, the Owner shall be liable for future utility service bills of the Tenant until such time that the violation is corrected.

2. The Department's Proposed Regulations Seek to Limit the Liability of an Owner with Respect to Non-minimal Use Violations by Apportioning the Utility Bill or Utility Service Charges Between the Owner and the Tenant.

The Department proposes to revise Section 29 to require that a utility company apportion its bill between the Owner and Tenant in connection with any retroactive re-billing that arises from an Owner's electric or gas meter Code violation. The proposed regulations provide that an Owner will no longer be liable retroactively for the Tenant's entire utility bill but will, instead, be liable for only the amount of the Tenant's utility bill that is attributable to the Owner's non-minimal use violation. As grounds for this proposed revision to the current regulations, the Department notes that the Code is not intended to unduly penalize an Owner for violation of the Code nor to unduly profit a Tenant in connection with such Code violation. Rulemaking Order, p. 6. The Department further notes that

under the current provisions of Section 29,[6] the manner by which an Owner's liability is calculated for a non-minimal use violation may result in an unjust penalty for the Owner and an undue enrichment of the Tenant since the Owner's retroactive liability for the Tenant's entire bill for up to two years allows the Tenant to avoid payment for the portion of electricity or gas actually used or consumed by the Tenant. Rulemaking Order, p. 6-7. Indeed, the Department points out that in *Moruzzi*,[7] it applied the waiver provision in Section 29[8] to redress this imbalance or inequality and to apportion the utility bill between the Owner and the Tenant in connection with a non-minimal use violation. Rulemaking Order, p. 7.

The Department's proposed regulations would hold electric and gas companies responsible for determining or otherwise calculating the amount of an Owner's proportional liability on a retroactive bill in non-minimal use violation cases. Specifically, the proposed regulations would require the utility companies to calculate an Owner's proportional liability by determining the cost of operating any appliance, apparatus or service wrongfully connected to the Tenant's meter that is the basis of the violation. Rulemaking Order, p. 6. The Department notes that such determination may be based upon industry standards for the appliances at issue, the average kilowatt-hour or therm usage; typical use patterns; an analysis of billing patterns; or such other reasonable methods devised by the utility companies. *Id*. at 6. Finally, the Department notes that the utility companies would be required to explain to the Owner and the Tenant the method used in arriving at the amount determined to be the Owner's proportional liability for the retroactive bill. *Id*.

3. The Department Should Establish an Objective Standard for Determining the Cost of Operating an Appliance, Apparatus or Service.

The Department's proposed regulations would require a utility company determination regarding the cost of operating an appliance, apparatus or service where such appliance, apparatus or service is wrongfully connected to a Tenant's meter in violation of the Code. The Department suggests that such determination may be based upon industry standards for the appliance, apparatus or service at issue; the average kilowatt-hour or therm usage; typical use patterns; an analysis of billing patterns; or such other reasonable methods devised by the utility companies. The various methods by which a determination may be reached regarding the cost of an appliance, apparatus or service are non-uniform

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[6] 220 C.M.R. § 29.07(2).

[7] *Moruzzi, Mo-Del Landscape Inc. v. Commonwealth Gas Company*, D.P.U./D.T.E. 96-AD-6 (2001)(where the Department allowed a waiver of 220 C.M.R. §29.07(2) to allow the Owner to pay only those gas charges attributable to a certain hallway baseboard heater and not the Tenant's entire gas bill for the retroactive time period).

[8] 220 C.M.R. § 29.13.

and may result in irregularities and/or discrepancies in the outcome.[9] The Attorney General recommends that the Department establish an objective standard or set of criteria for determining the cost of operating an appliance, apparatus or service.[10] An objective standard would foster uniformity in the manner or method by which the cost of an appliance, apparatus or service is determined and thus yield uniform results.

The proposed objective and/or uniform standard may be developed by the Department in conjunction with the utility companies and such resulting standard should be regularly updated to reflect new efficiencies and technological changes. Further, the resulting standard should be applied on a statewide basis to re-billing determinations arising from Code violations. The uniform standard would not only provide an objective basis for determining an Owner's proportional liability in non-minimal violations, but would serve to facilitate the Department's review on appeal by either the Owner or the Tenant.

4. The Department Should Retain the Exclusive Decision-Making Authority and Discretion in Apportioning a Retroactive Utility Bill Between an Owner and a Tenant, or in the Alternative, Narrowly Tailor the Decision-making Authority Being Delegated to the Utility Companies.

The Department's proposed regulations would hold electric and gas companies responsible for determining or otherwise calculating the amount of an Owner's proportional liability on a retroactive bill in non-minimal use violation cases. Determining an Owner's liability in a non-minimal use case as provided in the proposed regulations is quite unlike determining an Owner's liability in a minimal use case. First, in a non-minimal use case, the fact-finding and decision-making process which the utility companies would be required to conduct is far more involved and complicated than that of a minimal use case. Further, the fact-finding and decision-making process in a non-minimal use case leaves much discretion or subjective judgment in the hands of the utility company in connection with apportioning a retroactive utility bill between an Owner and a Tenant.

Therefore, the Attorney General recommends that the Department retain the exclusive decision-making authority and discretion in apportioning a retroactive bill between an Owner and a Tenant. As an alternative to the foregoing, the Attorney General recommends that the Department tailor the proposed regulations more narrowly to remove the substantial level of fact-finding or decision-making authority provided to the utility companies and to also remove the substantial discretion and/or subjective judgment left in the hands of the utility companies in connection with their determination of an

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[9] In the absence of an objective and/or uniform standard, it is conceivable that like cases may be dealt with differently and thus yield different results.

[10] The Attorney General appreciates the challenges that would be posed in developing an objective and/or uniform standard, but believes that the benefits of such a standard are immeasurable.

Owner's proportional liability on a retroactive utility bill.[11] As an example of the kind of tailoring that the Attorney General recommends in this matter, under the current regulations in instances involving minimal use violations, the Department narrowly tailored or otherwise limited a utility company's decision-making authority and discretion in determining an Owner's retroactive liability. Essentially, the Department only authorized the utility company to select the lesser of three categorized time periods and apply a mandated flat billing rate of $10.00 per month for the appropriate retroactive time period.[12] Barring the Department retaining the exclusive authority and discretion in determining an Owner's proportional liability on a non-minimal use violation case, the Department should more narrowly tailor the proposed regulations to reduce a utility company's authority and discretion in the decision-making process.

Finally, to further the goal of determining an owner's historic responsibility objectively, the Department should require that electric and gas companies file the re-billed charges and supporting work papers and documentation with the Department prior to rendering the bill to allow the Department to review the charges for compliance with its regulations. Every Tenant aggrieved by the utility's decision should have the opportunity to have the utility's decision reviewed by the Department.

5. The Department Should Include a Deterrence Provision in its Proposed Regulations.

The Attorney General notes that under the current provisions of Section 29, in circumstances involving non-minimal use violations, an Owner's retroactive liability for a Tenant's entire gas or electric service bill serves as a deterrence against the commission of such Code violations. The proposed regulations seemingly are lacking in deterrence value or effect as compared to the current regulations. Accordingly, the Attorney General recommends that the Department retain or otherwise include a deterrence component or provision in the proposed regulations to discourage Owners from opting to commit Code violations where the benefit of such conduct may outweigh the cost to such Owner.[13] In other words, where the cost of committing a violation is no greater than the cost of not committing a violation, a tangible incentive to keep Owners in compliance with the Code or conversely, a tangible deterrence to discourage Owners from violations of the Code should be included. The Attorney

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[11] This substantial authority and discretion would be substantially alleviated by the Department's development and implementation of an objective and/or uniform standard as discussed above.

[12] The current regulations provide a simple and clear objective formula, procedure or method for calculating an Owner's liability on a retroactive bill in minimal use violation cases.

[13] Seemingly, under the proposed regulations the remedial cost to an Owner who commits a cross-wiring violation is no greater than the cost where the Owner complies with the Code from the onset.

General, although not advocating the imposition or inclusion of a penalty provision in the proposed regulations, believes that deterrence may be achieved by several means including the assessment of retroactive interest charges on any amount to be paid by the Owner or by holding such Owner liable for the administrative costs of determining the operating costs of any appliance, apparatus or service improperly connected to a Tenant's meter in violation of the Code.

6. Conclusion.

For the foregoing reasons, the Attorney General urges the Department to: (1) establish an objective standard or set of criteria for determining the cost of operating an appliance, apparatus or service improperly connected to a Tenant's meter in violation of the Code; (2) retain the exclusive decision-making authority and discretion in apportioning the utility bill or utility service charges between an Owner and a Tenant, or in the alternative, narrowly tailor the decision-making authority being delegated to the utility companies; and (3) include a deterrence provision in the proposed regulations.

Sincerely,

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